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No. 38

In the Supreme Court of the United States

OCTOBER TERM, 1956

THOMAS E. POLLARD, PETITIONER

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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OCTOBER, 1956.

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I. IN ADDITION TO RESTING UPON ONE SINGLE PREMISE WHICH IS IN CONFLICT WITH THE RECORD, THE GOVERNMENT'S BRIEF APPEARS TO HAVE CONCEDED A NUMBER OF PETITIONER'S PRINCIPAL POINTS.

Point I of the Government's Brief (pages 13-17) argues that the district court did not dispose of the case when petitioner was before that court on the morning of October 3, 1952. For reasons shown in Petitioner's Brief (and especially pages 6-13 and 21-26 thereof), such an argument

is wholly without foundation and is contradicted by the facts shown in the record.

What does the Government's Brief (see page 15) offer in support of its contention that the case was not disposed of when petitioner was present in court on the morning of October 3, 1952? Primarily, it is a suggestion that we should resort to some sort of "presumption" that what the trial judge intended on that morning was to suspend imposition of sentence and that, because of a "lapse", the judge "failed to express" this. Yet as Petitioner's Brief (pages 21-24) has shown, the particular statute under which petitioner had pleaded guilty fixes no minimum level of punishment at all. In the face of this the Government's Brief does not really challenge the fact that it was within the judge's lawful power to make the very disposition which petitioner contends, and the record shows, the judge actually made on the morning of October 3, 1952—namely that no imprisonment and no probation should be imposed. Indeed, the Government's Brief does not cite a single case which raises any doubt that this was within the judge's lawful power.

If there were any "lapses" in this case—and certainly the record shows that there were—they occurred not during the morning session of the district court on October 3, 1952, but afterwards. On the whole record, which is studded with so many irregularities on the part of the district court and of the United States Attorney's Office,[1] there is plainly no

[1] The Government's Brief (page 18), complaining of the assertion that what occurred was in shocking disregard for petitioner's rights, makes a labored effort to gloss over all these lapses by saying: "We believe that such lapses as occurred in the matter of sentencing were technical and inadvertent". But they can hardly be looked upon as merely "technical", in the sense in which that word is normally used. And even if they were "inadvertent", inadvertence would not save them from being thoroughly discreditable to the administration of the criminal law.

room for indulging in any such strained "presumption" as the Government now suggests. Moreover, despite some slight intimation to the contrary in the Government's Brief (pages 10, 15), there is nothing in Rule 32 or elsewhere in the Federal Rules of Criminal Procedure which coerces a trial judge into imposing the punishment of imprisonment or probation in a case where no minimum punishment of this nature is required by the statute under which the defendant stands convicted.

Because this factually unsupported argument is the single premise on which the Government's entire Brief is built, the Government's Brief becomes even more notable for the things it does not say.

For example, the Government's Brief in no way denies that—if this Court should determine a disposition of the case was made on the morning of October 3, 1952—then the Fifth Amendment's prohibition against Double Jeopardy was violated by what later occurred. Nor does the Government's Brief deny that—if this Court should determine a disposition of the case was made on the morning of October 3, 1952—then the Fifth Amendment's guaranty of due process of law was likewise violated by what later occurred. Nor does the Government's Brief deny that—if this Court should determine a disposition of the case was made on the morning of October 3, 1952—then what later occurred constituted such a serious departure from proper standards of criminal law administration as to require the corrective action sought by petitioner.

Furthermore, the Government's Brief does not deny that, as contended in Point II of Petitioner's Brief, the sentencing hearing is an integral part of a criminal "trial" as the word "trial" is used in the Speedy Trial Clause of the Sixth Amendment.

II. THE GOVERNMENT'S PRINCIPAL CITATIONS ARE WIDE OF THE MARK.

The principal citations in the Government's Brief, and particularly the parade of citations appearing at pages 22 through 25, apparently have likewise been offered on the untenable assumption that the district court did not make a disposition of the case on the morning of October 3, 1952. They would have genuine relevance only if the events which occurred in open court on the morning of October 3, 1952, were to be ignored and the case were to be judged as if those events had never taken place.

Moreover, even if some basis could be found for the Government's untenable assumption, it is still doubtful that the cases cited would be of much help to the Government. For they are cases which did not present contentions under the Speedy Trial Clause of the Sixth Amendment and, in addition, many of them arose before the adoption of the mandatory requirement in Rule 32(a) of the Federal Rules of Criminal Procedure that "Sentence shall be imposed without unreasonable delay." And none of those cases, it should be added, involved the kind of gross violence to the principles of fair play which is apparent from the record presently before this Court.

There is no occasion to disagree with the general principle, which the Government's Brief (page 22) quotes from the opinion in *Bozza v. United States*, 330 U.S. 160, 166-167, that: "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." But Petitioner's Brief (pages 24-25) already has shown why *Bozza* is totally inapplicable here. And certainly a second general principle, which has the further advantage of being really applicable to the present case, must be equally true: The Constitution does not contemplate that sentencing should be a game in which a wrong move by the judge, after he has once made a lawful

disposition granting freedom to the accused, can mean the infliction long afterwards of unlawful imprisonment.

CONCLUSION

For the reasons set forth in Petitioner's Brief and the further reasons set forth in this Reply Brief, petitioner is entitled to the relief sought.

Respectfully submitted,

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OCTOBER, 1956.

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